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The Doctrine of Forum Non Conveniens – A Deep Dive, and A Comparative Analysis

Jayanti Srivastava^a

^aO.P. Jindal Global University, Sonipat, India

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The laws that exist in today's world were all put in place by the lawmakers to ensure that everyone seeking justice has the proper methods, and information to attain it. Many provisions were made to make sure that no particular person or group of people is more disadvantaged than others. Be that in the matter of education, profession, or even while seeking remedies from the Courts. To ensure that parties of a case are not disadvantaged compared to the other, there are multiple laws or doctrines that have been put into place. One such doctrine is the doctrine of Forum Non-Conveniens, which ensures that one party is not at a disadvantage due to the choice of Court for redressal, and if it is, it provides that party with the option to request for a change in the Court. This paper is a deep dive into this doctrine, explaining the meaning, and how it works. It also presents a comparative analysis of this doctrine, of how it functions in India, and how it functions in other countries.

Keywords: *forum non-conveniens, comparative analysis, redressal, civil procedure code.*

INTRODUCTION

When a Suit is filed in a court, or in a forum, one of the most important factors to look at is the jurisdiction. Jurisdiction, in the most basic sense, means – which Court is competent, or adequate to try this particular case? When that question is answered, the Suit filed in adequate

Court. Jurisdiction, while determining, is of three types. These three types are - original jurisdiction, territorial jurisdiction, and pecuniary jurisdiction. Original jurisdiction means that the Suit should be filed in the most appropriate Court at the bottom of the hierarchy. Section 15 of the Civil Procedure Code, 1908¹ dictates this rule. The territorial jurisdiction of a Court is determined on the basis of the geographical location where the cause of action has arisen and is governed by sections 16 to 20 of the Civil Procedure Code, 1908.² Lastly, sections 6, 7, and 8 of the Civil procedure Code, 1908 speak of the Pecuniary Jurisdiction of a Court.³ Pecuniary jurisdiction is when the appropriate Court is decided on the basis of the valuation of the Suit. Therefore, after taking all of these factors into consideration, the Suit is filed in a court having appropriate jurisdiction. For example, if there is a Suit to be filed regarding a property dispute, the property is situated in Rohini, Delhi, and the valuation of the Suit comes up to Rs. 7,00,000/- (rupees seven lakh only), then the suit would be filed at the district court in Rohini. There may, however, be some cases where one or more Court has the jurisdiction to try a case. In those cases, one of the Courts in which the suit has been filed has the discretion to reject the suit so that it can be filed in the Court that is more convenient to everyone involved in the suit.

This discretionary power that the Courts possess is called *Forum Non-Conveniens*. This is a Latin term, which, when translated, means “Inconvenient Forum” or “Inappropriate Forum”. It is a discretionary power that Courts have where they can reject a suit on the grounds that there exists a forum or Court that is more appropriate to try the matter. In the case of *Indra Deo Paswan & Ors. v. Union of India*, the Court has used the definition from the Black’s Law Dictionary (Seventh Edition, page 665) to describe this doctrine as follows – “The doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought.”⁴ Dismissal of the suit by one Court or Forum does not mean that the plaintiff cannot file the case again, in the more appropriate Court or Forum. However, even if the plaintiff brings the case to the wrong forum, the Court

¹ Civil Procedure Code 1908, s 15

² *Ibid* s 15

³ *Ibid* s 6, 7, 8

⁴ *Indra Deo Paswan & Ors v Union of India* [2005] DLT 125 763

won't exercise *Forum Non-Conveniens* if there is no other Court that can try the case, or if they think that the other Court won't provide adequate compensation.

A question that arises here, is that how does the Court then decides when they can use this power? The legal position with regards to the principle of *Forum Non-Conveniens* was explained in the case of *India TV Independent News Service Pvt. Ltd. v. India Broadcast Live LLC and Others*.⁵ It was held by the Court that this principle can be employed by Courts when the Court is satisfied that there is another forum that is available, more suitable, and has jurisdiction over the matter; furthermore, as a general, rule, the Plaintiff's choice of forum will not be disturbed unless and until the balance of convenience is strongly in favour of the defendant.⁶ While in the process of determining whether a more convenient forum exists to address the matter at hand, the Court looks into factors such as – the convenience of both the parties, expenses involved in the Suit, and the law that governs the relevant transactions.⁷ In the case of *Indra Deo Paswan & Ors. v. Union of India*, the Court said that balance of convenience is a material consideration in any case and that if the balance of convenience is heavily in favour of the defendant, in this case, or of any one party in the general case, then the doctrine of *forum non-conveniens* must be applied.⁸ The High Court of Delhi has further clarified the important factors that must be considered while applying this doctrine, in the case of *Glaxosmithkline Consumer Healthcare Ltd. v. Heinz India Pvt. Ltd.*⁹ It was laid down that the Courts must follow a two-stage inquiry process. The first part, while examining the case at hand is, as mentioned above as well, to ensure that there is an alternative forum that is appropriate to try the case.¹⁰ Secondly, to make sure that it is in the interest of justice to relegate the parties to another forum.¹¹ It is also very important to make sure that the first Court where the case has gone to also has jurisdiction over the matter. While considering the merits and demerits of transferring a Suit to another Court, the convenience of all parties is

⁵ *India TV Independent News Service Pvt Ltd v India Broadcast Live LLC & Ors* [2008] 22 CLA BL Supp 37 (Del)

⁶ *Ibid* 37

⁷ *Ibid* 37

⁸ *Paswan* (n 4)

⁹ *Glaxosmithkline Consumer Healthcare Ltd v Heinz India Pvt Ltd* [2009] DLT 156 330

¹⁰ *Ibid* 330

¹¹ *Ibid* 330

looked at, and the best possible solution for all is found. The observations of the Delhi High Court in the above case are worth noting. The Court observed that “*the principle of Forum Non-Conveniens flows from a desire to avoid multiplicity of proceedings and conflicting or confusing judgement. Each case must be decided on its own circumstances.*”¹² A judge rarely applies this doctrine. A suit is rejected on the basis of this doctrine only when the advantages and justice very clearly outweigh proceedings in that court which has jurisdiction, but there is another Court having jurisdiction that is more ‘natural’ and the plaintiff has avoided this Court for some particular reason; a reason which may cause a disadvantage to the defendant. Hence, more often than not, it is the defendant who pleads for the doctrine to be applied. However, there should be a distinct disadvantage to them when pleading for this doctrine to apply, otherwise denying the right to the plaintiff to decide their Court would be unethical, and wrongful in law.

While the balance of convenience is a material consideration that the Courts must take, it is not the sole criterion for the application of this doctrine. The Court would look at other factors, such as an agreement between the parties as well. Courts would generally give primacy to the governing law that has been contractually chosen.¹³ If the parties to the suit had a contract where they had agreed on a certain forum to approach in case of any grievances, despite the said forum being inconvenient for any of the parties, the disadvantaged party cannot plead for the application of this doctrine since they had agreed to the proceeding being brought to the forum, and that agreement would be legally binding. There are only very exceptional cases where the Court would declare a *Forum Non-Conveniens* upon a contractually agreed forum. In the case of *Modi Entertainment v. W.S.G Cricket*,¹⁴ the Court stated that a *Forum Non-Conveniens* can be granted on a contractually agreed forum through an anti-suit injunction. “*This anti-suit injunction can be granted by the court to prevent injustice if the scenario is such that it permits a contracting party to be relieved of the burden of the contract. The exceptions include events since the date of the contract which have made it impossible for the party seeking an injunction to*

¹² *Ibid* 330

¹³ *Pirmal Healthcare v Dia Sorin Spa* [2010] DLT 172 131

¹⁴ *Modi Entertainment v WSG Cricket* [2003] AIR SC 1177

litigate the case because the essence of the jurisdiction of the contractually chosen court no longer exists, or the court does not exist at a later point of time or because of force majeure.”¹⁵

In the United States of America, the Court assesses two points when a request for *Forum Non-Conveniens* is brought in. The first is the balancing test, where they assess the private, as well as the public factors, and the second is the adequate alternative inquiry test. While performing the first part of the test – the balancing test, private factors such as ease of access to evidence, the interest of the parties, whether or not the plaintiff’s choice of Court is burdensome to the defendants, ease of obtaining witnesses, and enforceability of the judgement.¹⁶ If any of these are found to be causing any sort of unfair disadvantage to any of the parties involved, the Court can use their power and reject the suit. The public factors that the Court considers during the balancing test are as follows; whether the trial has the potential to confuse the jury; having juries who may have a connection to the case; interest in having the local matters heard at home, and having an adequate trial in the place where the state laws govern.¹⁷ After considering all of these factors, the Court moves on to the second part of the test – the Adequate Alternative Inquiry Test. In this test, the Court requires that the Defendant must offer an alternate Court or Forum that is competent to hear the case, and the alternate Court must possess the ability to provide an adequate remedy to the plaintiff as well.¹⁸ The topmost priority for the Courts is to always ensure that both sides get adequate justice and that the scale is not tipping in favour of one side. Thus, after considering all of these factors, the Court makes a decision on whether or not it will try the case. More often than not, the Court only invokes the principle of *Forum Non-Conveniens* when it thinks that it is a highly inappropriate forum to be trying the case at hand, and it is absolutely sure that there is another Court that would be better suited for trial. If the Court fails to make sure of the same, it would be causing grave injustice to the parties involved.

¹⁵ *Ibid* 1177

¹⁶ Legal Information Institute, ‘*Forum non Conveniens*’ (*Legal Information Institute*, 2020) <https://www.law.cornell.edu/wex/forum_non_conveniens> accessed 15 June 2021

¹⁷ *Ibid*

¹⁸ *Ibid*

However, despite having exercised this doctrine on multiple instances, the U.S Courts have no legislative backing for it. The Courts generally weigh out the merits and demerits of the case on the basis of its facts and accordingly decide whether a satisfactory alternate Court exists, which is more convenient for the parties, and whether this matter should be presented in front of the other Court instead. A lot of civil law countries do not recognize the principle of *Forum Non-Conveniens* owing to its uncertainty of application and the vast discretionary powers given to the judiciary.

The Courts in the United States, on occasions, attach some conditions with the application of this doctrine. They may require the defendants to waive off some defenses that could prevent the plaintiffs from filing the suit in the appropriate forum, or they might dismiss the case in the favour of a foreign Court, but only on the condition that the defendant allows an “American Style” discovery.¹⁹ When appealed, the *Forum Non-Conveniens* decisions are given out on a highly discretionary standard, which can sometimes be a great disadvantage to the parties involved. In the case of *Piper Aircraft Co. v. Reyno*, the Supreme Court of America held that as long as there is an alternative forum available to the parties to the suit, it did not matter that the remedy available to them in the alternative forum was highly insufficient.²⁰ Lower Courts, however, do not follow this judgement as a rule. They usually consider how adequate or inadequate the alternative forum would be. But this was an example of how this discretionary power can be misused by the Courts.

Some of the more recent rulings in American cases have been as follows. In the case of *Sinochem International Co. Ltd. v. Malaysian International Shipping Corp.*, it was held that “a federal court may hear and pass a ruling on a *Forum Non Conveniens* claim even if that Court does not necessarily have subject-matter jurisdiction or personal jurisdiction over the case in front of the court. The Court held that while courts typically need to consider personal jurisdiction and subject-matter jurisdiction before hearing a case on the merits, this procedure does not necessarily apply when considering non-merits issues.”²¹ In a subsequent case of 2013, it was clarified by the court that

¹⁹ *Ibid*

²⁰ *Piper Aircraft Co v Reyno* [1981] 454 US 235

²¹ *Sinochem International Co Ltd v Malaysian International Shipping Corp* [2007] 549 US 422

“when a Court needs to grant a *Forum Non Conveniens* claim, the issuing court should use 28 U.S.C. 1404(a), which speaks of the change of venue of a suit, which states, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”²² The application of the doctrine of *Forum Non-Conveniens* by the Courts of the United States of America has evolved over the years to be what it is now and has improved at every stage, to ensure that both parties involved get equal justice.

This doctrine of *Forum Non-Conveniens* is followed by various countries around the world, as was described above. Other than the United States of America, Australia is another such country that follows this doctrine. In the Australian context, for the doctrine of *Forum Non-Conveniens* to apply, the Court must be a “clearly inappropriate forum.”²³ This principle was further discussed by the Australian Courts in the case of *Voth v. Manildra Flour Mills Pty Ltd*,²⁴ where the Court adopted the test that was laid down by Deane J in *Oceanic Sun Line Special Shipping Co. Inc. v. Fay*.²⁵ The test explained that a stay should be granted in the cases where the local Court is very clearly an inappropriate forum, and continuing with the proceedings would be oppressive, in the sense that it would be “seriously and unfairly burdensome, prejudicial or damaging”, or vexatious, in the sense that it would be “productive of unjustified trouble and harassment.”²⁶ Other factors that are considered by Australian Courts are the personal or juridical advantage of the parties, economic burdens, local professional standards, the law of the local forums, foreign law cases, and agreements to refer disputes to a foreign Court.²⁷

There has, however, been a critique of the current Australian approach and position with regards to this doctrine. Firstly, there is great confusion as to whether the test of “vexatious or oppressive” is still applicable or not. It had been introduced by a judgement given in the year

²² *Atlantic Marine Construction Co v US District Court for Western District of Texas* [2013] 571 US 49

²³ *Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] 165 CLR 197 (Australia)

²⁴ *Voth v Manildra Flour Mills Pty Ltd* [1990] 65 ALJR 83 (HC) (Australia)

²⁵ *Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] 165 CLR 197 (Australia)

²⁶ *Ibid* 197

²⁷ Sewell & Kettle, ‘Forum non Conveniens - Sewell & Kettle’ (Sewell & Kettle, 2020)

<<https://sklawyers.com.au/dictionary/forum-non-conveniens/#:~:text=Forum%20non%20conveniens%20is%20a,which%20to%20hear%20the%20matter>> accessed 20 June 2021

1988 and had been used in many cases after that. However, there was a period of time in the 1990s where this test had been regularly discarded by many of the Australian High Courts.²⁸ In recent cases, however, this test has been picked up again. Therefore, there is much confusion with regard to the validity of this test. Secondly, it was questioned by the Courts on what exactly is meant by the Court is “clearly inappropriate”? Some judges have even called for a balancing exercise,²⁹ similar to what is done in the Indian and U.S Courts, in order to cut down the ambiguity with regards to what is considered “clearly inappropriate”.

As was shown in the entirety of this paper, the doctrine of *Forum Non-Conveniens* rests largely on discretionary powers of the Courts and the judges. This can be a good thing, as well as a bad thing. The doctrine in itself has many negative and positive aspects, in my opinion. The positive aspects are that it ensures that everyone involved in the suit has an equal opportunity for justice and that no one party has an unfair advantage over the others. However, the fact that this is a power that rests on the discretion of the Courts and the judges, leaves a little too much scope for misuse of the same, as was seen above in a case brought in front of the Supreme Court of America. In my personal opinion, this doctrine should have some legislative backing, in whichever country it may be used, and it must be much less ambiguous. The scope and the tests for the employment of this doctrine must be clearly laid out. With every case, the doctrine is changing and evolving. Sometimes the evolution is forwards, while sometimes it is backward. However, just the existence of such a doctrine has been in the favour of justice to all.

²⁸ Anthony Gray, *Forum Non Conveniens in Australia: A Comparative Analysis* (Common Law WR No 207, 223, 2009)

²⁹ *Ibid* 227